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COMMENTS

JOURNALISTIC MALPRACTICE: THE NEED FOR A PROFESSIONAL STANDARD OF CARE IN DEFAMATION CASES

In *Gertz v. Robert Welch, Inc.*,¹ the United States Supreme Court said "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."² The decision halted a ten-year trend in the law of defamation. From 1964 until the decision came down in 1974, the Supreme Court had consistently broadened press protection, making it increasingly difficult for plaintiffs to recover from media defendants who disseminated defamatory statements about them.³ The *Gertz* decision, however, provided the states with the opportunity to impose greater protection for their citizens, often to the detriment of this growing press freedom.

Although the *Gertz* decision did not recommend that the states adopt any particular standard of liability in private plaintiff defamation cases, a majority of jurisdictions have since adopted a simple negligence standard.⁴ As a result, juries of "reasonable men" in those jurisdictions have been sec-

1. 418 U.S. 323 (1974).

2. *Id.* at 347. The rejection of liability without fault, meaning liability based solely on the fact that the published statement was false, constituted a change from the common law rules of defamation. See *infra* notes 11-19 and accompanying text.

The law of defamation recognizes two types of plaintiffs: "public" plaintiffs, which include public officials and public figures, and "private" plaintiffs, which include individuals of little or no notoriety. See *Gertz*, 418 U.S. at 351-52; see also *infra* notes 25, 28, 32, 41 and accompanying text.

For the purposes of this Comment, a plaintiff who is characterized as either a public official or a public figure will be referred to as a "public plaintiff." Plaintiffs classified as private individuals will be referred to as "private plaintiffs."

Also, the terms "published" and "printed" will refer to the dissemination of information, whether by the printed media or the broadcast media.

3. The trend began with *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). In that case, the Supreme Court placed a burden on public officials seeking damages for defamation to prove that the defendant published with knowledge that the statement was false or with reckless disregard for whether it was false or not. *Id.* at 278-80.

For an overview of the *Times* case and other landmark defamation cases, see *infra* notes 20-48 and accompanying text.

4. See *infra* notes 49-53 and accompanying text. The simple negligence formula looks for a breach of one's duty to exercise reasonable care toward another that results in harm to that person. If the injured party can prove a causal connection between his injuries and the defendant's

ond-guessing journalists who have printed unintentionally defamatory material about private individuals. Thus, the basis for some editorial decisions has shifted from an evaluation of whether the information is true to an evaluation of how expensive it will be to prove its truth in court.⁵ As expected, the self-censorship that has resulted from this second-guessing appears to have decreased the level of false and defamatory information reaching the public. However, the dissemination of accurate information has decreased as well, since publishers tend to avoid potentially defamatory stories that could lead to litigation.⁶

This "chilling" result of the *Gertz* decision has prompted some to question the constitutionality of allowing the states to adopt a simple negligence standard in defamation cases. Critics question whether the same standard of care should determine both the validity of exercising a constitutionally guaranteed right and the monetary liability of a driver in an auto accident.⁷ Such a system seems to contradict the Supreme Court's statement that "[f]reedom of press, freedom of speech, [and] freedom of religion are in a preferred position" in comparison to mere economic interests.⁸

Several states, in response to these concerns, have adopted a negligence standard that entails a "professional" standard of care for journalists. The

failure to use reasonable care, the defendant will be liable. See W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 30 at 143 (4th ed. 1971).

The key aspect of this formula for purposes of this Comment is that the exercise of reasonable care is normally measured according to the conduct of a reasonably prudent person. However, when the defendant is a skilled professional, his conduct is measured according to the skill normally exercised within the profession. *Id.* § 32 at 149. Such a standard gives deference to the judgment of the professional.

As several commentators have noted, four of the six *Gertz* opinions used the term "negligence" at some point in their discussions. Thus, it is not surprising that the states would adopt this standard. Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1427 (1975); Franklin, *What Does "Negligence" Mean in Defamation Cases?*, 6 COMM/ENT L.J. 259, 259-60 n.5 (1984). However, there was no indication in any of the *Gertz* opinions of whether the negligence standard should be that of the reasonably prudent person or that applying to the skilled professional.

5. *Cf. Times*, 376 U.S. at 279.

6. See, e.g., Riley, *Lawyers Who Look for Libel*, Nat'l L.J., May 27, 1985, at 1, col. 1 (discussing libel lawyers who screen potentially defamatory stories before publication).

7. *Cf. McChrystal, Reconciling Defamation Law and the Free Enterprise System When the Media Provides Consumer or Investor Information*, 17 TEX. TECH. L. REV. 183, 195 (1986).

The first amendment to the United States Constitution, which is the only amendment in the Constitution to explicitly provide protection for a profession, says "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

8. *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943).

adopted standard is similar to that applied to doctors in malpractice cases.⁹ Its intended effect is to limit findings of liability to cases in which journalists are truly culpable, yet it also is intended to protect the interests of individuals in their own reputations. Adoption of this approach on a national basis would permit the courts to better protect both the constitutionally guaranteed rights of the press and the interests of individuals in privacy.

This Comment will begin by presenting an historical background of the law of defamation in the United States. Next, it will provide an in-depth examination of the competing interests in private plaintiff defamation cases. It will then propose a change in the standard of liability as well as a change in the means of proof of liability in private plaintiff defamation cases. Finally, this Comment will examine several jurisdictions that have adopted these proposed standards.

I. HISTORY OF LIBEL IN THE UNITED STATES¹⁰

A. Common Law Origins

Defamation has been defined as a statement which tends to bring the plaintiff into hatred, contempt or ridicule to a substantial and respectable group.¹¹ At common law, such defamatory statements earned no protection under the first amendment, since the harm they caused was said to outweigh their contribution to ordered democracy.¹²

A publisher who disseminated defamatory material under the common law was held strictly liable for his statements.¹³ Thus, in order to recover

9. See *infra* notes 116-42 and accompanying text.

10. For a good overview of the law of defamation up until 1975, see generally Eaton, *supra* note 4.

11. D. SPENCER, LAW FOR THE REPORTER 81 (5th ed. 1980). More completely, defamation is defined as a statement which tends to "diminish the esteem, respect, goodwill or confidence in which the plaintiff is held, or to excite adverse, derogatory or unpleasant feelings or opinions against him." W. PROSSER, *supra* note 4, § 111, at 739 (footnote omitted).

Historically, defamation has been categorized as either libel or slander. Slander is oral defamation. Libel is written or printed defamation, including that which is disseminated by the media and is preserved in some permanent form. This Comment, dealing with media defendants, will focus on libelous forms of defamation.

12. See, e.g., *Roth v. United States*, 354 U.S. 476, 486-87 (1957); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942); *Near v. Minnesota ex rel Olson*, 283 U.S. 697, 715 (1931).

The Supreme Court in *Chaplinsky* expressed the sentiment of the day when it said that false statements "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky*, 315 U.S. at 572.

13. W. PROSSER, *supra* note 4, § 113, at 773. Prosser also notes that "[t]he effect of this strict liability is to place the printed, written or spoken word in the same class with the use of explosives or the keeping of dangerous animals." *Id.* Defense of this classification rested on the great danger

damages, a plaintiff merely had to set forth evidence that the defendant had published a defamatory statement about him. A plaintiff did not need to prove that the statement was false, that the defendant knew it was false, or that the defendant had failed to exercise reasonable care in determining its falsity;¹⁴ the plaintiff carried the benefit of a presumption that the statement was false. Further, the plaintiff was not required to provide any evidence of injury, since there was an irrebuttable presumption of injury to his reputation upon proof of the statement's publishing.¹⁵

As a defense to an action for libel, the defendant could assert either that the statement was true or that it was in some way privileged. If the statement was privileged, although false, the defendant was shielded from liability for its damages. A defendant could assert a conditional privilege on the grounds that the statement was a fair and accurate report of a public hearing or proceeding.¹⁶ In other instances, the defendant could claim a privilege if the issue to which the defamatory statement related was socially important, and if he made the statement in good faith based on a reasonable belief.¹⁷ A final privilege-based defense was the claim that the statement was an instance of fair comment and criticism of a "public offering."¹⁸

All of these privileges, however, dissolved upon proof that the defendant published the statement out of spite or ill-will toward the plaintiff. They

of harm to a reputation accompanying the mass distribution techniques used by media. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 392 (1974) (White, J., dissenting).

The justification for strict liability was to insure compensation where it was justified yet difficult or impossible to prove. *Eaton, supra* note 4, at 1357. It also gave the plaintiff an opportunity publicly to clear his name of the cloud placed on it by the defamatory statement. *Id.* at 1359.

14. *Eaton, supra* note 4, at 1353.

15. *Id.* A distinction, however, was made between a libelous statement that was defamatory on its face and one that was defamatory only in light of other facts.

If the statement was libelous on its face, meaning that the danger of injury to reputation was apparent from the words themselves, the statement was actionable per se. In such a case, the plaintiff was not required to provide evidence of damages, since they were presumed to have occurred. *Id.* at 1354. A statement making a charge of "mental illness" would be considered actionable per se. *Cowper v. Vannier*, 20 Ill. App. 2d 499, 156 N.E.2d 761 (1959).

However, if the statement was defamatory only when examined in light of extrinsic facts, it was actionable per quod. In such a case, the plaintiff was required to plead and to prove special damages. *Eaton, supra* note 4, at 1355. The classic example of a statement actionable per quod was a false statement saying that a woman had given birth when she had been married only one month. *Morrison v. Ritchie & Co.*, [1901-02] Sess. Cas. 645 (Scot.2d Div.), 39 Scot. L. Rep. 432 (1902) (cited in *Eaton, supra* note 4, at 1355 n.20).

16. *D. SPENCER, supra* note 11, at 89.

17. *Id.*

18. *Id.* This defense usually arose in cases involving the editorial review of plays, restaurants and other services offered to the public. For an example of the broad latitude granted in exercising a right to fair comment and criticism, see *Cherry v. Des Moines Leader*, 114 Iowa 298, 86 N.W. 323 (1901).

also terminated upon a showing that the defendant knew the statement was false or that he had reason to believe it was false when he published it.¹⁹

B. New York Times Co. v. Sullivan

In *New York Times Co. v. Sullivan*,²⁰ the United States Supreme Court added a constitutional dimension to the law of defamation by holding that the first amendment bars strict liability for defamatory statements concerning government officials;²¹ statements of this sort do not automatically forfeit their first amendment protection because they are false or defamatory.²² The rationale of the decision was that the public interest in obtaining information crucial to self-governance outweighs the personal interest of public officials in protecting their reputations.²³ In so holding, the Court said:

The constitutional guarantees require . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not.²⁴

Implicit in the decision is the belief that a democratic society requires "uninhibited, robust, and wide-open" debate in order to function, as well as the realization that such debate might — and should — include criticism of government officials.²⁵ Thus, the Court set a constitutional standard granting the media great protection when it reports upon governmental activities.

Four years later, the Court stated that proof of a media defendant's simple negligence will not establish the "reckless disregard for [the] truth"

19. Eaton, *supra* note 4, at 1353-54.

20. 376 U.S. 254 (1964).

21. *Id.* at 279.

22. *Id.* at 279-80.

23. *Id.* at 271 (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940)).

24. *Times*, 376 U.S. at 279-80. The Court had acknowledged that the concept of the first amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection." *Id.* at 270 (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945)). Thus, the Court reasoned, in order to guarantee the existence of this "multitude of tongues," the state must be prohibited from censoring statements merely because it finds them threatening.

25. *Id.* at 270. The Court set out more clearly its definition of a "public official" in *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971) (candidates for public office and statements relating to their fitness for office), and *Rosenblatt v. Baer*, 383 U.S. 75 (1966) (non-elected official with control over conduct of governmental affairs). For state court applications of this standard, see Annotation, *Libel and Slander: Who is a Public Official or Otherwise Within the Federal Constitutional Rule Requiring Public Officials to Show Malice*, 19 A.L.R. 3d 1361 (1968).

that is requisite to liability under the actual malice standard.²⁶ Instead, the Court said that there must be evidence that "the defendant in fact entertained serious doubts as to the truth of his publication."²⁷ In another case, the Court extended its requirement of a showing of actual malice to those plaintiffs the Court called "public figures." This category includes people who, though not holding an elected or appointed office, have assumed roles of prominence and influence in society.²⁸

C. *Rosenbloom v. Metromedia, Inc.*

The Supreme Court in *Rosenbloom v. Metromedia, Inc.*²⁹ greatly — though temporarily — expanded the first amendment protection afforded media defendants in private plaintiff defamation cases. In *Rosenbloom*, the Court extended the requirement of proof of actual malice to all plaintiffs, both public and private, when the issue to which the defamatory statement related was one of "public or general concern."³⁰ The actual malice requirement applied whether the plaintiff was a public official or an unknown private citizen; it also applied regardless of whether the plaintiff's involve-

26. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). The Court in *Times* recognized that a vigorous debate on issues of public concern would inevitably lead to the negligent dissemination of some false information. However, the Court decided that the need for this debate outweighed the harm caused by such unintended misinformation. *Times*, 376 U.S. at 271.

27. *St. Amant*, 390 U.S. at 731.

28. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967) (athletic director at state university who was paid with private funds) (a companion case, *Associated Press v. Walker*, concerned a prominent former military leader).

The Court in *Gertz*, however, gave a more clear definition of "public figures" when it said: For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.

Gertz, 418 U.S. at 345.

29. 403 U.S. 29 (1971).

30. *Id.* at 44. The Court declined to define the parameters of this standard, however, leaving the states to deal with an I'll-know-it-when-I-see-it definition. *Id.* at 44-45.

Because of this, later state cases applying the standard were unable to specify its limits. They described it as a "necessarily broad" standard and simply cited previous cases decided under *Rosenbloom*. See Comment, *The "Public Interest or Concern" Test — Have We Resurrected a Standard That Should Have Remained in the Defamation Graveyard?*, 70 MARQ. L. REV. 647, 665 (1987) (quoting *AAFCO Heating & Air Conditioning Co. v. Northwest Publications*, 162 Ind. App. 671, 686, 321 N.E.2d 580, 590 (1974), cert. denied, 424 U.S. 913 (1975)).

ment in the issue to which the statement related was voluntary or involuntary.³¹

In so holding, the Court rejected as artificial any distinction between statements defaming "public" and "private" individuals, choosing instead to focus on the issue about which the statement was made.³² The threshold consideration thus became whether the public had an interest in learning about the issue to which the defamatory statement related.³³

The *Rosenbloom* opinion, however, was a plurality decision containing five separate opinions. None of these opinions attracted the support of more than three justices,³⁴ and a more decisive statement was needed.³⁵ That statement came three years later in *Gertz v. Robert Welch, Inc.*³⁶

D. *Gertz v. Robert Welch, Inc.*

The case of *Gertz v. Robert Welch, Inc.*³⁷ presented the Court with an opportunity to modify the position it had taken earlier on the standard of liability in private plaintiff defamation cases;³⁸ it was an opportunity the Court did not let slip by.³⁹ The conflict required a balancing of the consti-

31. The extension of the actual malice standard to private plaintiffs in this case found its support in the Supreme Court's earlier decision of *Time, Inc. v. Hill*, 385 U.S. 374 (1967). In that case, the Court looked strictly at whether the plaintiffs were involved in a matter of public interest en route to holding that they had to meet the actual malice standard in order to recover.

32. *Rosenbloom*, 403 U.S. at 44. The Court said "the First Amendment's impact upon state libel laws derives not so much from whether the plaintiff is a 'public official,' 'public figure,' or 'private individual,' as it derives from the question whether the allegedly defamatory publication concerns a matter of public or general interest." *Id.*

33. *Id.* at 43.

34. Justice Black and Justice White concurred in the result of Justice Brennan's opinion, though they differed in their reasoning. Because of this, Justice Brennan's opinion gained the controlling force. *Id.* at 57 (Black, J., concurring); *id.* (White, J., concurring).

35. Justice Harlan, *id.* at 70 (Harlan, J., dissenting), and Justice Marshall, *id.* at 78 (Marshall, J., dissenting), provided a glimpse of the future of the law when they advocated allowing the individual states to determine their own standards of liability in private plaintiff defamation cases. Both dissenting opinions, however, stressed that liability without fault would not be an acceptable alternative.

36. 418 U.S. 323 (1974).

37. *Id.*

38. See *supra* notes 29-35 and accompanying text for a discussion of *Rosenbloom*, 403 U.S. 29.

39. The Court formulated the issue as being whether a media defendant can claim constitutional protection when its defamatory statements cause injury to "an individual who is neither a public official nor a public figure." *Gertz*, 418 U.S. at 332. This "definition by exclusion" is the closest the Court came to defining the concept of the private plaintiff, yet it used the phrase throughout its decision.

tutionally guaranteed right to freedom of the press against the rights of an individual to protect his own good name.⁴⁰ The result was a compromise.

The Court first acknowledged that the states have a stronger interest in protecting private individuals from defamation than in protecting public figures or officials from such harm.⁴¹ As a result, the Court decided the states should retain substantial latitude in regulating this area of defamation law.⁴² The Court then proceeded to reject the *Rosenbloom* decision's application of the actual malice standard to all cases concerning issues of "public or general interest"⁴³ regardless of the plaintiff's status.⁴⁴ The opinion noted that such a system furthers neither the interests of the state in protecting its citizens nor the rights of the public to enjoy a free press.⁴⁵

As a result of this setting of priorities, the Court held that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."⁴⁶ The decision went on to say, however, that states could not award punitive or presumed damages absent a showing of knowing falsity or reckless disregard for the truth in the defendant's statements.⁴⁷ In a later case, the Court held that

40. *Id.* at 342.

41. *Id.* at 343. This difference in interests stems from the idea that private citizens have less access to the media than do public figures or officials, so they have fewer opportunities to redress their injuries through means of self-help. Thus, the states are expected to provide an avenue of remedy through the courts. *Id.* at 344. Also, the Court recognized that public figures and officials have purposefully subjected themselves to public scrutiny in a way that private individuals have not. *Id.* at 344-45. Because of this, the public figure or official is less deserving of state protection than is the private individual. See *infra* notes 54-64 and accompanying text.

42. *Gertz*, 418 U.S. at 345-46.

43. *Rosenbloom*, 403 U.S. at 43-44; see also *supra* notes 29-35 and accompanying text.

44. *Gertz*, 418 U.S. at 345-46. The Court pointed out that such a distinction in essence left to trial judges the determination of "what information is relevant to self-government." *Id.* at 346 (quoting *Rosenbloom*, 403 U.S. at 79 (Marshall, J., dissenting)).

45. *Id.* at 345-46. This fact was illustrated well in an examination of the judicial latitude involved in the "general or public interest" standard. The Court pointed out that if a judge decided that the defamatory statement addressed an issue of public interest, a successful plaintiff would have to prove actual malice. This burden greatly reduced his likelihood of recovery, regardless of the extent of injury. However, if a judge decided that the statement was unrelated to a public issue, the defendant would be held strictly liable for it under common law, despite all of his precautions to ensure its accuracy. *Id.*

46. *Id.* The Court explained that the decision "recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, yet shields the press and broadcast media from the rigors of strict liability for defamation." *Id.* at 348.

47. *Id.* at 349. Presumed damages stem from the common law principles under which injuries are inferred from the fact of publication. See *supra* notes 11-19 and accompanying text. The Court explained that presumed damages should not be allowed for less than a showing of actual malice because the states have no interest in awarding damages that are in excess of actual injury.

where the defamatory statement relates to a matter of public concern, the plaintiff will bear the burden of proving both the falsity of the statement and the fault of the defendant in making the statement.⁴⁸

E. State Applications of Gertz

In the wake of the *Gertz* decision, the individual states have approached the task of establishing their own particular balances between the individual's right to protect his reputation and the public's right to a free press. The majority of states have adopted some form of the negligence standard of liability.⁴⁹ Under this approach, liability is generally premised on a sim-

Id. The Court asserted the same grounds for barring recovery of punitive damages without a showing of actual malice. *Id.* at 350.

But in a recent case involving a non-media defendant, the Supreme Court said that punitive damages may be awarded without a showing of actual malice when the "defamatory statements do not involve matters of public concern." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 763 (1985). In that case, a credit reporting agency distributed an inaccurate credit report concerning the plaintiff. It is unclear how much, if any, media protection the Court withdrew with the decision. The plurality opinion said the holding did not turn on the economic or commercial nature of the speech involved nor on the non-media nature of the defendant. This Comment, however, is directed at initial showings of fault and will assume that the issue to which the statement relates is a matter of public concern. Therefore, *Greenmoss Builders* will not be discussed in detail.

48. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986).

49. See, e.g., *Mead Corp. v. Hicks*, 448 So. 2d 308 (Ala. 1983); *Peagler v. Phoenix Newspapers, Inc.*, 114 Ariz. 309, 560 P.2d 1216 (1977); *Dodrill v. Arkansas Democrat Co.*, 265 Ark. 628, 590 S.W.2d 840 (1979), *cert. denied*, 444 U.S. 1076 (1980); *Corbett v. Register Publishing Co.*, 33 Conn. Supp. 4, 356 A.2d 472 (1975); *Re v. Gannett Co., Inc.*, 480 A.2d 662 (Del. Super. Ct. 1984), *aff'd*, 496 A.2d 553 (Del. 1985); *Phillips v. Evening Star Newspaper Co.*, 424 A.2d 78 (D.C. 1980), *cert. denied*, 451 U.S. 989 (1980); *Miami Herald Publishing Co. v. Ane*, 458 So. 2d 239 (Fla. 1984); *Triangle Publications, Inc. v. Chumley*, 253 Ga. 179, 317 S.E.2d 534 (1984); *Cahill v. Hawaiian Paradise Park Corp.*, 56 Haw. 522, 543 P.2d 1356 (1975); *Troman v. Wood*, 62 Ill. 2d 184, 340 N.E.2d 292 (1975); *Gobin v. Globe Publishing Co.*, 216 Kan. 223, 531 P.2d 76 (1975); *McCall v. Courier-Journal & Louisville Times Co.*, 623 S.W.2d 882 (Ky. 1981), *cert. denied*, 456 U.S. 975 (1982); *Wilson v. Capital City Press*, 315 So. 2d 393 (La. Ct. App. 1975), *cert. denied*, 320 So. 2d 203 (La. 1975) (specifically approving decision); *Jacron Sales Co. v. Sindorf*, 276 Md. 580, 350 A.2d 688 (1976); *Stone v. Essex County Newspapers, Inc.*, 367 Mass. 849, 330 N.E.2d 161 (1975); *Jadwin v. Minneapolis Star and Tribune Co.*, 367 N.W.2d 476 (Minn. 1985); *Brewer v. Memphis Publishing Co.*, 626 F.2d 1238 (5th Cir. 1980) (applying Mississippi law), *cert. denied*, 452 U.S. 962 (1981); *Hyde v. Columbia*, 637 S.W.2d 251 (Mo. Ct. App. 1982), *cert. denied*, 459 U.S. 1226 (1983); *Madison v. Yunker*, 180 Mont. 54, 589 P.2d 126 (1978); *McCusker v. Valley News*, 121 N.H. 258, 428 A.2d 493 (1981), *cert. denied*, 454 U.S. 1017 (1981); *Marchiondo v. Brown*, 98 N.M. 394, 649 P.2d 462 (1982); *Walters v. Sanford Herald, Inc.*, 31 N.C. App. 233, 228 S.E.2d 766 (1976); *Thomas H. Maloney & Sons, Inc. v. E.W. Scripps Co.*, 43 Ohio App. 2d 105, 334 N.E.2d 494 (1974), *cert. denied*, 423 U.S. 883 (1975); *Martin v. Griffin Television, Inc.*, 549 P.2d 85 (Okla. 1976); *Bank of Oregon v. Independent News, Inc.*, 65 Or. App. 29, 670 P.2d 616 (1983), *aff'd*, 298 Or. 434, 693 P.2d 35 (1985), *cert. denied*, 474 U.S. 826 (1985); *Mathis v. Philadelphia Newspapers, Inc.*, 455 F. Supp. 406 (E.D. Pa. 1978) (applying Pennsylvania law); *DeCarvalho v. daSilva*, 414 A.2d 806 (R.I. 1980); *Jones v. Sun Publishing Co.*, 278 S.C. 12, 292

ple negligence standard, which inquires whether the defendant's actions departed from the standard of care normally exercised by a reasonably prudent person.⁵⁰ Five of these negligence states, however, have adopted a higher standard of liability that entails a "professional" standard of care. This scheme examines whether the defendant's conduct departed from the standards of skill and care normally exercised within the profession of journalism.⁵¹

At least three states have retained the *Rosenbloom* requirement that private plaintiffs prove actual malice in order to recover.⁵² New York has instituted a standard that requires private plaintiffs to show that the publishing of the statement was "grossly irresponsible" conduct.⁵³

II. PRIVATE PLAINTIFF DEFAMATION LAW — COMPETING INTERESTS

The laws governing defamation of private individuals seek to balance two competing values: (1) the legitimate state interest in compensating individuals for the harm defamatory falsehoods inflict on them, and (2) the interest in avoiding media self-censorship that emanates from the constitutionally guaranteed freedoms of speech and press.⁵⁴ Both of these interests form the foundations of a democratic society, and despite the apparent apprehensions of some,⁵⁵ they are not mutually exclusive. Closer examination of the law in this area, however, reveals that a simple negligence standard, as applied in most states, provides greater protection for the individual in-

S.E.2d 23 (1982), *cert. denied*, 459 U.S. 944 (1982); *Memphis Publishing Co. v. Nichols*, 569 S.W.2d 412 (Tenn. 1978); *Foster v. Laredo Newspapers, Inc.*, 541 S.W.2d 809 (Tex. 1976), *cert. denied*, 429 U.S. 1123 (1977); *Seegmiller v. KSL, Inc.*, 626 P.2d 968 (Utah 1981); *Colombo v. Times-Argus Ass'n, Inc.*, 135 Vt. 454, 380 A.2d 80 (1977); *Gazette, Inc. v. Harris*, 229 Va. 1, 325 S.E.2d 713 (1985), *cert. denied*, 422 U.S. 1032 (1985); *Taskett v. King Broadcasting Co.*, 86 Wash. 2d 439, 546 P.2d 81 (1976); *Crump v. Beckley Newspapers, Inc.*, 320 S.E.2d 70 (W. Va. 1983); *Denny v. Mertz*, 106 Wis. 2d 636, 318 N.W.2d 141 (1982), *cert. denied*, 459 U.S. 883 (1982); *Adams v. Frontier Broadcasting Co.*, 555 P.2d 556 (Wyo. 1976).

See also Annotation, *State Constitutional Protection of Allegedly Defamatory Statements Regarding Private Individual*, 33 A.L.R.4TH 212, 226 (1984).

50. See, e.g., *Troman*, 62 Ill. 2d at 197-98, 340 N.E.2d at 298-99; *McCall*, 623 S.W.2d at 885; *Schrottman v. Barnicle*, 386 Mass. 627, 640, 437 N.E.2d 205, 214 (1982).

51. See *infra* notes 116-42 and accompanying text for an in-depth discussion of these cases.

52. See *Walker v. Colorado Springs Sun, Inc.*, 188 Colo. 86, 538 P.2d 450 (1975), *cert. denied*, 423 U.S. 1025 (1975); *AAFCO Heating & Air Conditioning Co. v. Northwest Publications, Inc.*, 162 Ind. App. 671, 321 N.E.2d 580 (1974), *cert. denied*, 424 U.S. 913 (1976); *Peisner v. Detroit Free Press, Inc.*, 82 Mich. App. 153, 266 N.W.2d 693 (1978).

53. *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, ___, 341 N.E.2d 569, 571, 379 N.Y.S.2d 61, 64 (1975).

54. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974); *Martin v. Griffin Television, Inc.*, 549 P.2d 85, 90 (Okla. 1976).

55. See *Gertz*, 418 U.S. at 392 (White, J., dissenting).

terest in reputation than for press freedom. The result is unwarranted media self-censorship.

The United States Supreme Court, in examining these interests, has said that an individual's right to protect his reputation "reflects no more than our basic concept of the essential dignity and worth of every human being — a concept at the root of any decent system of ordered liberty."⁵⁶ Individuals sacrifice this right, to some degree, when they thrust themselves into the spotlight in order to influence the resolution of public questions.⁵⁷ This understanding, however, seems to justify greater protection for those who choose to go unnoticed — protection for those private individuals who make up the vast majority of this country's population.

While the courts view the public figure and the public official as individuals "assuming the risk" of rigorous public inquiry,⁵⁸ they view the private individual as one making a conscious decision to avoid such scrutiny and its accompanying criticism.⁵⁹ In essence, the private individual is seen as more worthy of protection. Thus, even if a publisher suspects a private individual of committing a morally reprehensible act, he must be aware that the dissemination of that suspicion may not be considered vital to our self-governance;⁶⁰ if he publishes the rumor and it proves to be an erroneous accusation, he may suffer civil liability for his action. However, if he publishes the same false report about a public official, he is less likely to incur liability, since these statements are considered important in shaping the well-informed populace requisite to self-governance. In taking this approach, the law of defamation merely attempts to protect the undisturbed anonymity to which most of us have become accustomed in our daily lives. This interest consists of a freedom of choice that the media cannot, on their own volition, take from the citizens.

56. *Id.* at 341 (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring)).

57. *Id.* at 351; *see also supra* notes 20-28 and accompanying text.

58. *See Curtis Publishing Co. v. Butts*, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring).

A recent example of this heightened public scrutiny is the 1987 Supreme Court confirmation hearings. In those hearings, members of Congress quizzed Judge Robert Bork about his past decisions and about his opinions on a myriad of legal issues. His nomination eventually was rejected. The next nominee, Judge Douglas Ginsburg, withdrew from consideration when intense media scrutiny revealed that he had experimented with marijuana while teaching law at Harvard University.

59. Justice Brennan, in his plurality opinion of *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), dismissed this public-private plaintiff distinction as a "legal fiction." *Id.* at 48. He said the public interest transcends the status of the plaintiff, and such a distinction "bears little relationship either to the values protected by the First Amendment or to the nature of our society." *Id.* at 47.

60. *See Gertz*, 418 U.S. at 340 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

The private plaintiff's limited access to the media serves as a further justification for increased protection of his rights.⁶¹ The courts recognize that a public figure or official is more likely than a private individual to have access to the press as a means of rebutting any false or defamatory statements. Thus, the public figure has a wider array of protections than merely resorting to litigation.⁶² But the private individual, being of no great interest to the reading and viewing public, is unlikely to generate the media attention necessary to counter the harm of the original report; litigation is his most powerful weapon. Critics of this basis for distinguishing plaintiffs, however, describe it as an unsubstantiated generalization;⁶³ the reality of press coverage is that although the public official may have press access, retractions rarely carry a great enough curing effect to rectify the harm originally inflicted.⁶⁴

On the other end of the balance of defamation law rests the freedom of the press.⁶⁵ This interest encompasses more than merely the rights of the media defendant involved in the immediate litigation;⁶⁶ it includes the constitutional rights of all media as well as the public interest in a free flow of information.⁶⁷ The proposition that a democratic society requires a diverse market of ideas, in which truth will ultimately prevail over falsity, is central to the design of the first amendment to the Constitution, for it is the people who determine what constitutes the truth.⁶⁸ Necessarily, this system requires the protection of some false statements in order to avoid suppression

61. See *Time, Inc. v. Hill*, 385 U.S. 374, 391 (1967). This assertion, however, presupposes that media access is helpful in redressing the injuries of a defamed private plaintiff.

62. *Id.*

63. *Rosenbloom*, 403 U.S. at 47 (plurality opinion).

64. See *id.* "Denials, retractions, and corrections are not 'hot' news, and rarely receive the prominence of the original story . . . [T]he ability to respond through the media will depend on the same complex factor on which the ability of a private individual depends: the unpredictable event of the media's continuing interest in the story." *Id.* at 46.

65. See *Gertz*, 418 U.S. at 325, 340.

66. The importance of a positive outcome to the immediate defendant, however, has elevated due to the threat that a large adverse judgment could send a small media outlet into bankruptcy. See *Curley, How Libel Suit Sapped the Crusading Spirit of a Small Newspaper*, Wall St. J., Sept. 29, 1983, at 1, col. 1.

67. "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940). See also *Forer, Libel Law's Slow Disintegration; But a Federal Statute Could Help*, 16 STUDENT LAW. 27, 28 (1987).

68. See J. Milton, AREOPAGITICA, A SPEECH FOR THE LIBERTY OF UNLICENSED PRINTING TO THE PARLIAMENT OF ENGLAND (1644), reprinted in JOHN MILTON COMPLETE POEMS AND MAJOR PROSE 746 (1957), in which the author says "[l]et [Truth] and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter." See also *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

of those statements that are true. Since the press is one of the greatest single contributors to this diverse marketplace, restraints on its activities should be viewed with heightened suspicion.

In addition, the free press has been described as serving the public as a "watchdog" of its interests. Originally, it served this purpose most obviously with reference to the government by checking its abuses of power by bringing them to the attention of the public to which it was responsible.⁶⁹ In a related manner, however, the press serves as the public's "watchdog" on society itself, exposing those who fail to live within the bounds society sets, and letting others know more clearly just what those bounds are.⁷⁰ The press carries out this function not only by presenting a reflection of society and its values but also by indicating the direction in which society is developing.⁷¹ From this role arises a need — to some an obligation — to report on issues that directly concern private individuals. But strong counter forces embodied in the law of defamation discourage some journalists from taking the chances involved in writing about private individuals, and society loses valuable information as a result.

The widespread use of the simple negligence standard in defamation cases prompts conservative segments of the media to "steer clear" of hazardous or controversial stories concerning private individuals.⁷² Journalists who take the gamble of printing potentially defamatory material about a private individual rest their fate in the hands of a jury to assess the reasonableness of the publishing. This in itself can be a hazardous chore,⁷³ but when one considers the negative opinion some segments of society have of the media, it can become a losing battle — one which many publishers are not willing to fight. So although the simple negligence standard protects

69. See generally Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521. See also R. WOODWARD & C. BERNSTEIN, *ALL THE PRESIDENT'S MEN* (1974), for an account of the Washington Post's coverage of the Watergate affair.

70. This has long been a justification for newspapers printing a section listing people who have committed crimes in the community. The section serves three purposes: (1) to warn the readers about those of whom they should be wary, (2) to list in black and white exactly what constitutes unacceptable conduct, and (3) to warn the readers that if they fail to follow society's rules, they will be caught and punished.

71. Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422, 453-54 (1975).

72. Cf. *Time, Inc. v. Hill*, 385 U.S. 374. "A negligence test would place on the press the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it to verify the accuracy of every reference to a name, picture or portrait." *Id.* at 389.

73. "No one with the slightest appreciation for the myriad uncertainties of common law negligence would rely on the belief that reasonable care will preclude an adverse verdict." Anderson, *supra* note 71, at 460.

It can also be an expensive chore. One commentator estimates that authors and publishers today spend an average of \$200,000 per case to defend libel suits. Forer, *supra* note 67, at 27.

the interests of the private individual, this protection is achieved at the cost of press freedom.

Aggravating this tension is the realization that a distinction between public and private plaintiffs is irrelevant when the defamatory statement relates to an issue of public concern; the public either needs the information or does not need it, and that need does not grow or diminish based on the status of the plaintiff.⁷⁴ But since the law affords greater protection to coverage of public figures and officials, a legal bias exists in favor of those elements of the media that report on the workings of the "officialdom."⁷⁵ Thus, those less conventional branches of the press that cover the trends and conditions of society — specifically magazines and weekly news programs — face the burden of either conforming with the mainstream or paying the price for nonconformity, possibly in the form of civil liability to private plaintiffs.⁷⁶ This pressure arises despite the recognized public need for this type of information, even though it does not concern government activities. Our political system has never looked favorably upon such coercion to conform, especially when the exercise of a constitutional right hangs in the balance. Indeed, the senselessness of such pressure becomes clear when one realizes that it causes the media to bypass coverage of some topics deserving of discussion.

These weaknesses in applying the simple negligence standard to defamation cases are accentuated when one considers that its application can result in liability without fault, despite the Supreme Court's admonition against strict liability.⁷⁷ A jury judging whether a media defendant's conduct conformed to that of a reasonable man sees merely the publication of a defamatory statement, the falsity of which would have been revealed by some form of further investigation. The reasonableness of this further investigation from a journalist's perspective — considering the time constraints, the cost of the verification, and the timeliness of the information — is immaterial to the jury's deliberation. The jury is free to equate falsity with negligence merely by seizing upon the most plausible of any unmade inquiries,⁷⁸ each

74. *Rosenbloom*, 403 U.S. at 43.

75. *Anderson*, *supra* note 71, at 453.

76. *Id.* at 453-54.

77. *Gertz*, 418 U.S. at 347.

78. *Cf. Franklin*, *supra* note 4, at 278. *See Sibley v. Holyoke-Transcript Telegram Publishing Co., Inc.*, 391 Mass. 468, 461 N.E.2d 823 (1984), in which the defendant published an article falsely asserting that authorities were investigating the plaintiff for fraud. The article was based on a police affidavit in which the plaintiff's former employees had accused him of crimes. In attempting to verify the story, the reporter contacted the district attorney and the police chief, as well as attempting to contact the officer who filed the affidavit. The two former employees repeated their accusations at trial, but the jury found the defendant negligent for publishing the

evaluated in hindsight, consequently making the publisher the guarantor of truth in anything he publishes.

The ease of a jury's leap from falsity to negligence becomes more understandable when one considers that the same inclination is present in a member of the United States Supreme Court. Expressing his view that fault should not be a requisite to defamation liability, Justice White wrote: "I find it unacceptable to distribute the risk in this manner and force the wholly innocent victim to bear the injury; for, as between the two, *the defamer is the only culpable party*. It is he who circulated a falsehood that he was not required to publish."⁷⁹ This view, however, fails to recognize that despite the reasonable efforts of journalists, they will inevitably publish some false information.⁸⁰ The issue is to what extent we should censure activities that may make this possibility more likely.

Unnecessary self-censorship has resulted from the uncertainty embodied in defamation law's application of the simple negligence standard. Even if a defamation suit is unfounded, the mere threat of incurring the costs of defending the action can cause some journalists to decide against publishing.⁸¹ In many more cases, however, a reporter with a desire to avoid trouble for his employer may choose not to include a relevant fact in a story simply by hitting the delete key on his computer. These instances of individual self-censorship are impossible to trace, and it is no easier to estimate their effect on the flow of information to the public. But if even a fraction of the thousands of working journalists feel this apprehension, the resulting decrease in the flow of information warrants a change in the system.

III. A PROPOSED CHANGE IN PRIVATE PLAINTIFF DEFAMATION LAW

A. *Use of the Professional Standard of Care for Journalists*

A more equitable approach to private plaintiff defamation cases in which the negligence standard is applied would judge the actions of the media defendant based on whether it exercised the skill and knowledge normally possessed by members of the journalism profession. This "professional standard" would reduce many of the fears journalists harbor in

defamatory article. The judge denied a motion for judgment notwithstanding the verdict, saying the reporter should have directly contacted the complaining employees to assess their veracity.

79. *Gertz*, 418 U.S. at 392 (White, J., dissenting) (emphasis added).

80. As one commentator has noted, "[t]he sufficiency of a fact investigation and the reliability of information derived from such investigations are peculiarly susceptible to second-guessing." McChrystal, *supra* note 7, at 198.

81. See generally Curley, *supra* note 66. Cf. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964).

deciding whether to print potentially defamatory material; the journalist could publish, knowing that a group of possibly hostile jurors would not second-guess him simply because they happen to disagree with the decision. Instead, his compliance with the generally accepted standard of conduct in the profession would act to shield him from unwarranted liability and unwarranted self-censorship. More importantly, it would give the exercise of a constitutionally guaranteed right more deference than merely whether the community at large thought that exercise proper.

The Restatement (Second) of Torts has adopted this theory of "journalistic malpractice" in defamation cases,⁸² though few states have followed suit.⁸³ In its determination of what occupations constitute "professions," the Restatement considers whether special skill is required to perform the job; performance of a profession entails the exercise of skill described as follows:

[i]t is that special form of competence which is not part of the ordinary equipment of the reasonable man, but which is the result of acquired learning, and aptitude developed by special training and experience. All professions, and most trades, are necessarily skilled, and the word is used to refer to the special competence which they require.⁸⁴

As applied to the field of journalism, this professional skill would include the ability to weigh the time and expense involved in further verification of

82. RESTATEMENT (SECOND) OF TORTS § 580B comment g (1977). Section 580B, entitled *Defamation of Private Person*, states in full:

One who publishes a false and defamatory communication concerning a private person, or concerning a public official or public figure in relation to a purely private matter not affecting his conduct, fitness or role in his public capacity, is subject to liability, if, but only if, he

(a) knows that the statement is false and that it defames the other,
(b) acts in reckless disregard of these matters, or
(c) acts negligently in failing to ascertain them.

Id. Thus, the Restatement adopts the widely prevailing negligence standard in private plaintiff defamation cases. However, this negligence standard, as comment g to that section explains, is intended to be judged according to the professional standard of care.

83. See *infra* notes 116-42 and accompanying text for a discussion of the states adopting the "journalistic malpractice" approach. For a list of states adopting some form of the negligence standard, see *supra* note 49.

84. RESTATEMENT, *supra* note 82, § 299A comment a (1977). The Restatement's § 299A, entitled *Undertaking in Profession or Trade*, reads in full, "[u]nless he represents that he has greater or less skill or knowledge, one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities." *Id.*

Those occupations listed as professions include physician or surgeon, dentist, pharmacist, oculist, attorney, accountant and engineer. *Id.* at comment b. Occupations constituting skilled trades include airplane pilot, precision machinist, electrician, carpenter, blacksmith and plumber. *Id.*

information in relation to the urgency of the story. It might also include the journalist's peculiar knowledge and development of sources and verification techniques as well as standard practices employed at his place of employment.⁸⁵ When one considers that courts have applied a professional standard of care in cases involving "experienced milk haulers"⁸⁶ and travel agents,⁸⁷ it becomes apparent that the skill applied in exercising a constitutional right deserves more deference than merely whether a jury thinks it is reasonable.

An added advantage of this professional standard is that it takes into account operational differences within the profession by requiring different standards from different "specialists," or schools of journalism.⁸⁸ This approach eliminates the existing legal bias toward more conventional media⁸⁹ by taking into consideration the various time and cost restraints accompanying coverage of certain subject matters.⁹⁰ Thus, what may constitute reasonable publishing for a local television station might be an unreasonable standard by which to judge a weekly national news magazine.⁹¹ A caveat arises at this point, however, because although customs within a segment of the media should be taken into account, they cannot set the standard of liability if they are patently unreasonable.⁹²

85. One court, in rejecting the professional standard of care in private plaintiff defamation cases, said "[d]ue care in gathering information is not technical matter for which a jury unaided by experts would have no basis for decision." *Schrottman v. Barnicle*, 386 Mass. 627, ___, 437 N.E.2d 205, 215 (1982).

However, this statement misses one of the points of requiring a professional standard of care in journalism. While some aspects of the field of journalism would require expert testimony for non-journalists to understand, the purpose of this standard is less to enlighten the jury than to protect a constitutional right from unnecessary infringement. For example, a jury might find it easy to conclude that publishing material without an effort to verify constitutes negligence. However, there are circumstances in which publishing is reasonable without verification, such as when the story is based on police or court documents or when the story comes in over a syndicated wire service. *Anderson*, *supra* note 71, at 465-66.

86. *Jewell v. Beckstine*, 255 Pa. Super. 238, 386 A.2d 597 (1978).

87. *Josephs v. Fuller*, 186 N.J. Super. 47, 451 A.2d 203 (1982).

88. *See Anderson*, *supra* note 71, at 466-67.

89. *See Anderson*, *supra* note 71 (as well as text accompanying *supra* note 75).

90. Among these would be the recognition that magazines and weekly news programs generally present less "spot news" coverage and tend to work on in-depth stories concerning less conventional topics, such as the values and mores of society. Such stories create additional hazards of defaming private individuals that are not present in some mainstream publications, so this hazard could be taken into account in considering the defendant's actions.

91. *See Anderson*, *supra* note 71, at 467.

92. "In determining whether conduct is negligent, the customs of the community, or of others under like circumstances, are factors to be taken into account, but are not controlling where a reasonable man would not follow them." *RESTATEMENT*, *supra* note 82, § 295A.

Opponents of the journalistic malpractice standard object that if such a standard were employed, media outlets would set their own standards below that of actual reasonable care in order to avoid liability.⁹³ However, a media defendant's conduct, as with the conduct of legal and medical malpractice defendants, would be compared not only to the standards within his particular community but also to the standards existing in communities of similar character throughout the country. The circulation, budget, deadline pressures, space constraints and technological capabilities of the media defendant would be considered in determining to whom his conduct would be compared.⁹⁴ Thus, incentive to keep standards high would stem from the realization that their conduct will be compared to that of professionals in other towns who may not have lowered their standards.

This professional standard in defamation cases would examine the defendant's exercise of his journalistic skills and knowledge under the circumstances. The "circumstances" of each case would include the defendant's estimation of the urgency of the story, his reason for publishing, and his assessment of the likelihood that the story would cause harm if false.⁹⁵ Thus, given the journalist's knowledge of the costs and time constraints accompanying verification of any story, the standard would ask whether his assessment of the circumstances in this case fell within the bounds of how a reasonable journalist would have assessed the same or similar circumstances. If his evaluation was reasonable, the standard would further inquire whether his reaction to this assessment conformed to that of a reasonable journalist.

The first of these circumstances, the urgency with which the potentially defamatory story must be disseminated, is a key in determining whether the defendant exercised the skills of a reasonable journalist.⁹⁶ If the story requires prompt publication to insure its significance, less rigorous verification may be reasonable. However, if the publisher is a weekly journal, facing fewer deadline pressures than a daily journal, or if the story is one that would be as significant after another week's verification as it is without such added delay, more investigation may be required. Regardless of the

93. See, e.g., *Kohn v. West Hawaii Today, Inc.*, 65 Haw. 584, 656 P.2d 79 (1982). "In such a context it can only mean that the professional journalist should be judged by a standard below that of ordinary care." *Schrottman*, 386 Mass. at ___, 437 N.E.2d at 214.

94. Anderson, *supra* note 71, at 467.

95. RESTATEMENT, *supra* note 82, § 580B comment h, at 228. In making this evaluation of the different "circumstances" of the case, the importance of one or more factors could tip the balance in favor of the reasonableness of publishing.

96. *Id.*

urgency of the story, if quick and inexpensive forms of verification are available but are not used, the publishing may be unreasonable.

The second circumstance that is essential in determining whether the defendant acted as a reasonable journalist is his purpose in publishing the defamatory statement.⁹⁷ The courts generally recognize that one of the main functions of a free press in a democratic society is to inform the electorate on matters crucial to its self-governance.⁹⁸ When publication serves this purpose, the societal good requires that less stringent verification standards be deemed reasonable; this avoids the public losing access to the information completely. However, another function of the press is to entertain, and when this function enters the realm of discussing personal activities, a false statement may have devastating effects. Because stories of this sort are often not vital to self-governance, a requirement of more intense verification to constitute reasonable action may be justified. However, a journalist must further evaluate the more stringent requirement in light of his knowledge of verification techniques.

The final factor considered in determining whether the defendant acted as a reasonable journalist is his evaluation of the possible harm that could result from publishing the statements if they prove false.⁹⁹ If the statement appears defamatory on its face, a reasonable journalist probably would take extra steps to verify its contents. However, if the statement is defamatory only in light of facts unknown to the journalist, less verification would be reasonable. But again, the journalist is required to make this evaluation according to his knowledge of what it would cost to undertake further verification.

Unfortunately, none of the foregoing considerations arise in a vacuum. All of them may arise in the same story, and it requires a skilled professional, with experience in evaluating the time and expense involved in verification methods, to weigh these considerations in deciding whether to publish. In addition, the relative importance of one or more of these factors may offset the negative effect of another, thus justifying publishing with less investigation.¹⁰⁰ But whatever the conditions and whatever their combination, a jury cannot replicate the experience gained from years of evaluating and developing various avenues of verification.

97. *Id.*

98. *See Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940).

99. RESTATEMENT, *supra* note 82, § 580B comment h, at 229.

100. For example, if the information is critically important to the public, and it must be distributed immediately in order to be relevant, the fact that it is a highly defamatory statement on its face may be of less significance, thus permitting publication without investigation.

B. Use of Expert Witnesses To Determine Fault

The use of expert witnesses similar to those employed in medical and legal malpractice cases would be an integral part of implementing this "journalistic malpractice" standard in private plaintiff defamation cases. The journalism expert could testify to the customs common in the profession and to whether the defendant's conduct deviated from those customs. He also could provide insights into the considerations upon which a journalist reflects in deciding whether to print a potentially defamatory story and could give an indication of which of these factors may have weighed more heavily in the decision in the case at hand.

Yet despite the sometimes complicated thought process a journalist employs in deciding whether to publish, the purpose of expert testimony in these cases is as much one of constitutional protection as one of jury enlightenment. The stakes in a defamation case are not merely monetary; the possible impairment of a constitutionally guaranteed right hangs in the balance of every jury decision. This fact in itself warrants the requirement of expert testimony concerning reasonableness. However, when it is combined with the jury's readiness to equate falsity with culpability, the need for this testimony becomes even clearer.

The expert witness, by providing evidence that the jury must consider, can help avoid the trap of jurors evaluating journalistic conduct according to their own values and prejudices.¹⁰¹ This testimony also could reduce the likelihood that a jury will find liability simply because it disagrees with the published viewpoint or because the published viewpoint is unpopular in the community. In addition, the testimony of an expert would give a trial judge something more substantial on which to base a judgment notwithstanding the verdict if he believes the jury has chosen to inflict punishment instead of choosing to find facts. Thus, the focusing effect of expert testimony could serve to balance the scale that, because of some jurors' distaste for the media, already may be tipped against the defendant when trial begins.

C. Use of a Code of Professional Standards

In assessing the reasonableness of the defendant's conduct, an expert witness could testify in reference to a code of professional standards, as is done in other malpractice cases.¹⁰² Although an "enforceable" code of eth-

101. Cf. Anderson, *supra* note 71, at 466.

102. See, e.g., R. MALLIN & V. LEVIT, *LEGAL MALPRACTICE* § 256 (2d ed. 1981).

ics in the field of journalism carries ominous constitutional implications,¹⁰³ such an enforcement system would not be necessary to implement this form of expert testimony in defamation cases.

In most jurisdictions, violation of a legal or medical code of ethics does not in and of itself render that professional civilly liable.¹⁰⁴ In fact, some courts have held that the ethical considerations embodied in these codes constitute merely "some evidence" of the standard of care for the profession.¹⁰⁵ The same type of system could apply equally to the profession of journalism, using one or more of the aspirational codes of professional responsibility circulating in the industry.¹⁰⁶ Thus, no technically violable code of journalistic ethics is necessary for an expert to testify in reference to it.

Typical of the codes of ethics advanced today is the Radio-Television News Directors Association (RTNDA) Code of Broadcast News Ethics.¹⁰⁷

103. See, e.g., Fairness Doctrine Alternatives, 63 Rad. Reg. 2d (P & F) 488 (Fed. Comm. Comm'n 1987) (Repeal of the Fairness Doctrine); "Actively Censure" Out; "Mutual Trust" Now In, 75 QUILL 46 (1987). Cf. United States v. National Ass'n of Broadcasters, 553 F. Supp. 621 (D.D.C. 1982) (antitrust implications of advertising standards promulgated by National Ass'n of Broadcasters).

104. See, e.g., R. MALLIN & V. LEVIT, *supra* note 102, § 256. See also MODEL RULES OF PROFESSIONAL CONDUCT AND CODE OF JUDICIAL CONDUCT (1983), which says, "[v]iolation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached . . . [T]hey are not designed to be a basis for civil liability." *Id.* at 12.

But see Lysick v. Walcom, 258 Cal. App. 2d 136, 149, 65 Cal. Rptr. 406, 415 (1968), saying "the standard [of professional liability] is that of ordinary care . . . governed by the established standards of professional ethics . . ." *Id.*

105. E.g., Woodruff v. Tomlin, 616 F.2d 924, 936 (6th Cir. 1980) (legal profession).

106. An added benefit of such a code of ethics may be to enhance the credibility of journalists in the public eye. Some critics question whether this image enhancement actually would occur, pointing to law and medicine as professions with codes that are rarely used. See Sheran & Isaacman, *Do We Want a Responsible Press?: A Call For the Creation of Self-Regulatory Mechanisms*, 8 WM. MITCHELL L. REV. 1, 125 n.529 (1983).

But many journalists have recognized the need to enhance the credibility of the media, and professional ethics is often the starting point of the discussion. "What the public sees is the vast corporate enterprise of communication, presenting daily critiques of the rectitude and performance of others while refusing to concede that it should be subjected to an identical evaluation based on the same kind of standards." Carter, *Forward* to C. CHRISTIANS, K. ROTZOLL & M. FACKLER, *MEDIA ETHICS, CASES AND MORAL REASONING* at xii (1983).

107. Copies of this Code are available from RTNDA upon request and are supplied to members of the organization. The Code reads as follows:

The responsibility of radio and television journalists is to gather and report information of importance and interest to the public accurately, honestly and impartially.

The members of the Radio-Television News Directors Association accept these standards and will:

1) Strive to present the source or nature of broadcast news material in a way that is balanced, accurate and fair.

A. They will evaluate information solely on its merits as news, rejecting sensationalism or misleading emphasis in any form.

The first sentence of the Code states that it is the responsibility of broadcast journalists "to gather and report information of importance and interest to the public accurately, honestly and impartially."¹⁰⁸ The Code goes on to say that members of the organization will "promptly acknowledge and correct errors."¹⁰⁹ Another passage of the Code that is of interest in this context is the statement that members will "[r]espect the dignity, privacy and well-being of people with whom they deal."¹¹⁰ The Code concludes with the statement that members of RTNDA will "actively encourage" all journalists, whether members of RTNDA or not, to abide by the Code.¹¹¹

Whether a particular act constitutes a violation of a code such as the RTNDA Code of Broadcast Ethics can be a debatable issue in some cases; what is considered a violation in one newsroom may not be a violation in another. However, a code of this sort gives an expert witness a starting point — something on which to base his judgments of the media defendant's conduct. For example, an expert could testify to whether the defendant respected the dignity and privacy of the plaintiff to the fullest extent reasonably possible, considering the alternative methods of fact gathering available in professional journalism today. In other words, could this incident have been avoided through the exercise of reasonable journalistic care? The codes provide no specific benchmark by which to measure a defendant's conduct, but they indicate the type of conduct to which many journal-

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- B. They will guard against using audio or video material in a way that deceives the audience.
 - C. They will not mislead the public by presenting as spontaneous news any material which is staged or rehearsed.
 - D. They will identify people by race, creed, nationality or prior status only when it is relevant.
 - E. They will clearly label opinion and commentary.
 - F. They will promptly acknowledge and correct errors.
- (2) Strive to conduct themselves in a manner that protects them from conflicts of interest, real or perceived. They will decline gifts or favors which would influence or appear to influence their judgments.
 - (3) Respect the dignity, privacy and well-being of people with whom they deal.
 - (4) Recognize the need to protect confidential sources. They will promise confidentiality only with the intention of keeping that promise.
 - (5) Respect everyone's right to a fair trial.
 - (6) Broadcast the private transmissions of other broadcasters only with permission.
 - (7) Actively encourage observance of this Code by all journalists, whether members of the Radio-Television News Directors Association or not.

RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION CODE OF BROADCAST NEWS ETHICS (1987).

108. *Id.*

109. *Id.* § (1)F.

110. *Id.* § (3).

111. *Id.* § (7).

ists aspire, which could be considered some evidence of the standard of care in the profession.

D. Enacting a Federal Statute

The enactment of a federal statute encompassing this journalistic malpractice system would hasten the necessary steps toward press protection. The first amendment states that "Congress shall make no law . . . abridging the freedom . . . of the press . . ."¹¹² However, a federal libel law would not abridge the freedom of the press; it would make the exercise of first amendment freedoms less unpredictable¹¹³ and in turn would decrease the level of self-censorship in media today. Instead of prohibiting the discussion of any particular subject, the statute would be of a procedural nature, enunciating the standards of care and means of proof by which the publisher of defamatory material could expect to be judged.

Such a federal statute would help deter instances of unnecessary and expensive litigation by clearly defining the rights and obligations of both parties to private plaintiff defamation litigation. Each party would know more clearly what burden it would have to meet and what its likelihood of success would be. Properly formulated, it could bring an end to litigation based on little more than "name calling."¹¹⁴

In addition, a federal statute's standardization would prevent the ambiguities that accompany a basis of liability that varies from state to state. It would end the multi-state publisher's uncertainty about what jurisdiction's laws govern his case. Conversely, it would end the possibility of plaintiffs seeking out the jurisdiction with the strictest defamation laws in which to bring a cause of action. Far from abridging the freedom of press, such a statute would clarify the laws and reduce self-censorship, in turn enhancing press freedom.

112. U.S. CONST. amend. I. *See supra* note 7.

113. *See* Forer, *supra* note 67, at 28.

114. *See id.* at 29. Judge Lois Forer has proposed that libel in a federal statute be defined as "a statement that taken as a whole makes a verifiably false charge that the subject committed a specific criminal or other degrading act." *Id.* This definition would allow the use of summary judgment when a statement makes no charge of this nature.

IV. A CASE STUDY: FIVE JURISDICTIONS USING THE PROFESSIONAL STANDARD OF CARE¹¹⁵

A. Kansas — *Gobin v. Globe Publishing Co.*

Exactly seven months after the United States Supreme Court announced its decision in *Gertz v. Robert Welch, Inc.*,¹¹⁶ Kansas became the first state to embrace the concept of "journalistic malpractice." With its holding in *Gobin v. Globe Publishing Co.*,¹¹⁷ the Supreme Court of Kansas said that a media defendant will be liable when he negligently publishes a false statement that is defamatory on its face.¹¹⁸ Thus, Kansas became one of the first of many states to adopt a negligence standard in private plaintiff defamation cases.

However, the court said the conduct to which it would compare the defendant's would be "the conduct of the reasonably careful publisher or broadcaster in the community or in similar communities under the existing circumstances"¹¹⁹ The court cited no authority for its description of this professional standard of care, but based its statement on basic theories of negligence, saying "[t]he whole theory of negligence presupposes some uniform standard of behavior for the protection of others from harm."¹²⁰ The court cited the Kansas Constitution for indirect support of its adoption of some form of negligence standard, whether simple or professional, because of its call for citizens to be responsible for the abuse of their rights to free speech.¹²¹

The court's language saying the defendant would be judged according to professional standards in its community "or in similar communities" seems to have been included to allay the fear some critics expressed that the only media outlet in a one-medium town could set its own standards of care,

115. It is interesting to note that three of the five cases in which the courts adopted a professional standard of care for media defendants involved the defendant's allegations that the plaintiff was engaged in some form of cruelty to animals.

116. 418 U.S. 323 (1974).

117. 216 Kan. 223, 531 P.2d 76 (1975).

118. *Id.* at ___, 531 P.2d at 84.

119. *Id.*

120. *Id.* at ___, 531 P.2d at 83.

121. *Id.* Section 11 of the Kansas Bill of Rights reads:

LIBERTY OF PRESS AND SPEECH; LIBEL. The liberty of the press shall be inviolate; and all persons may freely speak, write or publish their sentiments on all subjects, *being responsible for the abuse of such rights*; and in all civil or criminal actions for libel, the truth may be given in evidence to the jury, and if it shall appear that the alleged libelous matter was published for justifiable ends, the accused party shall be acquitted.

KAN. CONST. B. of R., § 11 (emphasis added).

resulting in insulation from liability.¹²² Thus, a media defendant's fear that its standards will compare unfavorably to the standards practiced by media similarly situated across the country will serve to keep care at its highest.

In a subsequent hearing of the same case,¹²³ the supreme court took further steps in establishing journalism as a profession requiring a malpractice standard. In that case, the court received journalism textbooks into evidence under the Learned Treatises exception to the hearsay rule.¹²⁴

B. Oklahoma — *Martin v. Griffin Television, Inc.*

The next state to adopt a professional standard of care in defamation cases concerning private plaintiffs was Oklahoma in the case of *Martin v. Griffin Television, Inc.*¹²⁵ In describing its newly adopted standard of liability, the court said "the best evidence of the degree of care which ordinarily prudent persons would have exercised under given circumstances is the degree of care which ordinarily prudent persons, engaged in the same kind of business, customarily have exercised and commonly do exercise under similar circumstances."¹²⁶ The court seemed to attempt to clarify its intent that this constitutes a professional standard of care by saying that "[o]rdinary care under the circumstances is the same degree of care required of *physicians and surgeons in Oklahoma*."¹²⁷ Thus, the court endorsed a form of "journalistic malpractice" in its most literal form.

A later case characterized the adopted negligence standard as one that "requires the recognition of the peculiar needs of the electronic and printed media," principal among these needs being the one to avoid unnecessary self-censorship.¹²⁸

C. Utah — *Seegmiller v. KSL, Inc.*

In February of 1981, the Supreme Court of Utah held in *Seegmiller v. KSL, Inc.*¹²⁹ that "[t]he standard of due care requires only that the media personnel act as reasonably prudent persons in the industry would act to

122. See *supra* note 93 and accompanying text.

123. 229 Kan. 1, 620 P.2d 1163 (1980).

124. *Id.* at ___, 620 P.2d at 1166 (citing KAN. STAT. ANN. § 60-460(cc) (1979)). In this case, the court showed that journalism's qualification as a profession can cut both ways; the Learned Treatise evidence was submitted by the plaintiff against the media defendant.

125. 549 P.2d 85 (Okla. 1976).

126. *Id.* at 92 (quoting *Oklahoma Gas & Electric Co. v. Wilson*, 172 Okla. 540, 45 P.2d 750 (1935) (quoting from *Canadian Northern Ry. Co. v. Senske*, 201 F. 637, 642 (8th Cir. 1912))).

127. *Id.* (emphasis added).

128. *Benson v. Griffin Television, Inc.*, 593 P.2d 511, 513-14 (Okla. Ct. App. 1978).

129. 626 P.2d 968 (Utah 1981).

ascertain the truth.”¹³⁰ So began the most articulate court enunciation to date of the “journalistic malpractice” standard.

The Utah court went on to say “it is important to make clear that negligence in this context means a departure from standards which exist or ought to exist as standards of professional conduct in the news media industry.”¹³¹ In addition, the court quoted extensively from Comment g of section 580B of the Restatement (Second) of Torts as support for its position.¹³² The quoted material included reference to the different types of media — television, radio, newspaper and magazine — being governed by differing considerations due to their differing circumstances.¹³³

The court went on to hold that the use of expert testimony will normally be required to avoid imposing strict liability:

Although there may be causes which are so flagrant that expert testimony may not be required, the important interests to be protected, which are founded in the First Amendment, require that juries not be allowed to conclude that because a false, defamatory statement was published, negligence must therefore have occurred.¹³⁴

Thus, the Utah court recognized that the dual interests of first amendment protection and jury enlightenment required expert testimony. However, it clearly expressed its belief that avoiding infringement upon press freedom alone is enough to warrant this extra measure of protection.

D. Georgia — *Triangle Publications, Inc. v. Chumley*

In 1984, the Supreme Court of Georgia upheld the application of a journalistic malpractice standard in the case of *Triangle Publications, Inc. v. Chumley*.¹³⁵ Although the court did not discuss the use of expert testimony, it based its decision in part on the affidavit of a media expert. Thus, it is likely that the court would be receptive to testimony of expert witnesses.

In enunciating its standard of care, the supreme court said the acceptable standard of conduct would be defined by reference to the procedures a reasonable publisher in the defendant's position would have employed prior to publishing the material.¹³⁶ More precisely, the court said the defendant

130. *Id.* at 974.

131. *Id.* at 976.

132. *Id.* (quoting RESTATEMENT, *supra* note 82, § 580B comment g).

133. 626 P.2d at 976.

134. *Id.*

135. 253 Ga. 179, 317 S.E.2d 534 (1984).

136. *Id.* at ___, 317 S.E.2d at 537.

would be "held to the skill and experience normally exercised by members of [his] profession. Custom in the trade is relevant but not controlling."¹³⁷

The Georgia court went on to lay out several factors which it authorized a jury to consider in determining whether the defendant exercised due care; the relative weight accorded these factors seems a likely area in which to use expert testimony. These factors include: (1) whether the material was topical and required prompt publication; (2) whether the material was newsworthy and served the public interest; (3) the extent of damage that could result if the publication is false; and (4) the reliability of the source of the information.¹³⁸

E. Minnesota — *Jadwin v. Minneapolis Star and Tribune Co.*

The most recent state to adopt the professional standard of care in journalism was Minnesota in the 1985 case of *Jadwin v. Minneapolis Star and Tribune Co.*¹³⁹ In that case, the Supreme Court of Minnesota began by adopting a negligence standard of liability in private plaintiff defamation cases.¹⁴⁰

The court went on to clarify the standard of care by saying that "[c]ustoms and practices within the profession are relevant in applying the negligence standard, which is, to a substantial degree, set by the profession itself, though custom is not controlling."¹⁴¹ The court also stressed that its adoption of this standard was not intended to preclude a defendant from using any absolute or qualified privileges recognized in the state.¹⁴²

V. CONCLUSION

The adoption of a simple negligence standard in private plaintiff defamation cases was intended to require the press to exercise reasonable care in verifying anything it printed. Its result, however, has been to make it unreasonable to publish at all concerning certain subjects, and the public has suffered the brunt of this realization.

By opting for a professional standard of care in defamation cases, several states have recognized that protection of one right cannot be obtained simply by punishing the exercise of another. This professional standard of

137. *Id.* (citing RESTATEMENT, *supra* note 82, § 580B comment g).

138. Factors 1-3 are attributed to RESTATEMENT, *supra* note 82, § 580B. The court added the final factor on its own initiative.

139. 367 N.W.2d 476 (Minn. 1985).

140. *Id.* at 491.

141. *Id.* at 491-92 (quoting RESTATEMENT, *supra* note 82, § 580B comment g).

142. *Id.* at 492.

liability acknowledges the value of a free and vigorous press, as well as the inhibitory effect of unwarranted civil liability. Thus, it imposes liability only on those whose conduct is truly culpable, due to a failure to exercise the skill normally present in the profession. Without such press protection, it may well be the reasonable man who refrains from speaking.¹⁴³

HUGH J. O'HALLORAN*

143. *Cf. Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 360 (1974) (Douglas, J., dissenting).

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